DIFFERING BURDENS OF PROOF

Background & Analysis:

There are numerous burdens of proof across the various types of cases and hearings that appear in family court. When coordinated cases are heard at the same time, the judge should orally announce the proper burden of proof for each case type before the hearing begins so there is no ambiguity in the record. This procedure was recommended in In re D.S., 849 So. 2d 411 (Fla. 2d DCA 2003). If the parties are advised of the proper burdens of proof at the outset, then an appeal based upon improper burden of proof will be less likely to succeed. Further, the court's decision should indicate that each matter heard was (or was not) proven by its respective burden of proof.

Chapter 61 Proceedings

Generally, the burden of proof for Chapter 61 issues, as in other civil matters, is by the greater weight of the evidence. See Heim v. Heim, 712 So. 2d 1238, 1239 (Fla. 4th DCA 1998) (court observed that "[a]bsent some legislative direction to the contrary, we are reluctant to complicate the job of a trial court and require different quanta of proof for different issues in Chapter 61 proceedings").

Equitable Distribution

Pursuant to §61.075(1), Florida Statutes, the distribution of marital assets and liabilities should be equal unless other relevant factors would make an unequal distribution of marital assets necessary to do equity and justice between the parties. A trial court's ruling on the distribution of marital assets is subject to appellate review under an abuse of discretion standard. See Kovalchick v. Kovalchick, 841 So. 2d 669, 670 (Fla. 4th DCA 2003).

Alimony

The court must make findings of fact pursuant to §61.08(2), Florida Statutes to properly determine alimony. An award of alimony is usually not reversed on appeal absent an abuse of discretion. Ondrejack v. Ondrejack, 839 So. 2d 867, 870 (Fla. 4th DCA 2003) (citing to Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980)). "[A]s long as the award is 'within the parameters of reasonableness,' the trial court's alimony award should not be disturbed on appeal." Bacon v. Bacon, 819 So. 2d 950, 952 (Fla. 4th DCA 2002) (citation omitted).
For a modification of alimony, the moving party must demonstrate by the greater weight of the evidence: "(1) A substantial change in circumstances; (2) that the change was not contemplated at the final judgment of dissolution; and (3) that the change is sufficient, material, permanent, and involuntary." Antepenko v. Antepenko, 824 So. 2d 214, 215 (Fla. 2d DCA 2002) (citation omitted).

Pursuant to §61.14(7), Florida Statutes, "the proof required to modify a settlement agreement and the proof required to modify an award established by court order shall be the same."

Time Sharing and Visitation of Minor Child(ren)

The trial court is afforded wide latitude and discretion in determining time-sharing of minor child(ren), and thus, this decision may not be reversed unless no reasonable person would take the view adopted by the trial court. See Artuso v. Dick, 843 So. 2d 942, 944 (Fla. 4th DCA 2003). Further, "the trial court's factual determinations in custody proceedings should be accorded great weight due to the wide discretion reposed in the trial court where the future of young children is at stake." Ford v. Ford, 700 So. 2d 191, 195 (Fla. 4th DCA 1997).

A trial court has great discretion in setting a time-haring schedule of minor child(ren). Gerthe v. Gerthe, 857 So. 2d 306, 307 (Fla. 2d DCA 2003); Keitel v. Keitel, 724 So. 2d 1255, 1257 (Fla. 4th DCA 1999). It is within the trial court's discretion to restrict or limit time-sharing as may be necessary to protect the welfare of the child, and the appellate court will not reverse a trial court's order regarding time-sharing absent a finding of abuse of discretion. Damiani v. Damiani, 835 So. 2d 1168, 1169 (Fla. 4th DCA 2002).

A trial court does not have the same broad discretion in a modification of time-sharing as it does in an initial determination of time-sharing, and, in fact, has far less discretion to modify an existing time-sharing order. See Boykin v. Boykin, 843 So. 2d 317, 320 (Fla. 1st DCA 2003). In fact, a trial court may not modify a time-sharing schedule unless the party moving for such modification demonstrates: (1) a substantial or material change in the circumstances of the parties since entry of the custody and visitation order, and (2) that the welfare of the child will be promoted by a change in custody and visitation. Worthington v. MacGregor, 771 So. 2d 576, 577 (Fla. 4th DCA 2000).

In Knipe v. Knipe, 840 So. 2d 335, 340 (Fla. 4th DCA 2003) the court explained,
This 'extraordinary' burden test requiring a 'substantial and material' change in circumstances has been developed and applied in cases involving a change in primary physical custody. See Gibbs v. Gibbs, 686 So. 2d 639, 641 (Fla. 2d DCA 1997); Zediker v. Zediker, 444 So. 2d 1034, 1036-37 (Fla. 1st DCA 1984). The policies behind the test are to honor the res judicata effect of the original final judgment, See Zediker, 444 So. 2d at 1036, and to 'preclude parties to a dissolution from continually disrupting the lives of

children by initiating repeated custody disputes." Pedersen v. Pedersen, 752 So. 2d 89, 91 (Fla. 1st DCA 2000).

Child Support

"A child support determination is within the sound discretion of the trial court, subject to the statutory guidelines and the reasonableness test." Ondrejack, 839 So. 2d at 871. The "statutory guidelines" mentioned in the opinion refers to §61.30, Florida Statutes.

The party seeking modification of child support must prove by the greater weight of the evidence that (1) the modification is necessary for the best interests of the child, or (2) the modification is necessary because the child has reached the age of majority, or (3) there is a substantial change in the circumstances of the parties. Overbey v. Overbey, 698 So. 2d 811, 813 (Fla. 1997) (emphasis added). The language from the opinion mirrors §61.13(1)(a), Florida Statutes.

Paternity

"Under chapter 742, paternity must be established by clear and convincing evidence." T.J. v. Dep't of Children & Families, 860 So. 2d 517, 518 (Fla. 4th DCA 2003) (emphasis added); Gingola v. Fla. Dep't of Health & Rehabilitative Servs., 634 So. 2d 1110, 1111 (Fla. 2d DCA 1994); and §742.031(1), Florida Statutes.

This burden of proof cannot be avoided because the paternity adjudication was made in the context of another proceeding, such as one under Chapter 39. T.J., 860 So. 2d at 518.

Dependency

Section 39.507(1)(b), Florida Statutes, states that "a preponderance of the evidence will be required to establish the state of dependency." See also B.A.L. v. Dep't of Children & Families, 824 So. 2d 241, 242 (Fla. 4th DCA 2002) (applying a greater weight of the evidence standard).

Termination of Parental Rights

A statutory ground for termination of parental rights must be proven by clear and convincing evidence pursuant to §39.809(1), Florida Statutes. The court must also consider the manifest best interests of the child pursuant to §39.810, Florida Statutes.

In In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995), the Florida Supreme Court observed that in reviewing findings of the trial court made under a "clear and convincing" evidentiary standard:

[O]ur task on review is not to conduct a de novo proceeding, reweigh the testimony and evidence given at the trial court, or substitute our judgment for that of the trier of fact. Instead, we will uphold the trial court's finding "[i]f, upon the pleadings and evidence before the trial court, there is any theory or principle of law which would support the trial court's judgment in favor of terminating ... parental rights." (citation omitted).

Also, in N.L. v. Dep't of Children & Family Servs., 843 So. 2d 996, 999 (Fla. 1st DCA 2003) the court indicated, "Our standard of review is highly deferential. A finding that evidence is clear and convincing enjoys a presumption of correctness and will not be overturned on appeal unless clearly erroneous or lacking in evidentiary support."

Delinquency

"In a hearing on a petition alleging that a child has committed a delinquent act or violation of law, the evidence must establish the findings beyond a reasonable doubt." (emphasis added) §985.35(2)(a), Florida Statutes.

Domestic Violence Injunctions

An ex parte temporary injunction may issue "when it appears to the court that an immediate and present danger of domestic violence exists." §741.30(5), Florida Statutes. Additionally, Fla. Fam. L.R.P. 12.610(c)(1)(A) indicates, "For the injunction for protection to be issued ex parte, it must appear to the court that an immediate and present danger of domestic, repeat, or dating violence exists."

The evidence to support the issuance of an ex parte injunction should be "strong and clear" to balance the harm sought to be prevented against the respondent's right to notice and a hearing. Kopelovich v. Kopelovich, 793 So. 2d 31, 33 (Fla. 2d DCA 2001).

Section 741.30(6)(a), Florida Statutes, states that the court may grant appropriate relief, including an injunction, when "it appears to the court" that petitioner is "either the victim of domestic violence … or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence."

Appellate courts review the issuance of a permanent injunction for an abuse of discretion. Moore v. Hall, 786 So. 2d 1264, 1266-67 (Fla. 2d DCA 2001). Whether the conduct meets the statutory basis for domestic violence is a question of fact for the trial court, reviewed under the abuse of discretion standard.

Violation of Domestic Violence Injunction

A violation of a domestic violence injunction is punishable as indirect criminal contempt pursuant to §741.31(3), Florida Statutes and subject to Fla. R. Crim. P. 3.840. See also Wisniewski v. Wisniewski, 657 So. 2d 944 (Fla. 2d DCA 1995). The burden of proof in a hearing involving violation of terms of domestic violence injunction is beyond a reasonable doubt. Hunter v. State, 855 So. 2d 677, 678 (Fla. 2d DCA 2003). Additionally, a violation of a domestic violence injunction may be prosecuted criminally as a first degree misdemeanor pursuant to §741.31(4), Florida Statutes.

A person accused of violation does not have the burden of going forward at the outset of the hearing to show why he or she should not be held in contempt. Tide v. State, 804 So. 2d 412, 413 (Fla. 4th DCA 2001). "Because criminal contempt is 'a crime in the ordinary sense,' a contemnor must be afforded the same constitutional due process protections afforded to criminal defendants." Id. (quoting Feltner v. Columbia Pictures Television, Inc., 789 So. 2d 453, 455 (Fla. 4th DCA 2001)) (citation omitted). Therefore, the person seeking the order of contempt has the initial burden of going forward at the contempt hearing.

In a case based entirely on circumstantial evidence, the party seeking the contempt finding has the burden of presenting evidence from which the court can exclude every reasonable hypothesis except that of guilt. Fay v. State, 753 So. 2d 682, 683 (Fla. 4th DCA 2000).

Criminal Contempt

The burden of proof in criminal contempt proceedings is beyond a reasonable doubt. See Kramer v. State, 800 So. 2d 319, 320 (Fla. 2d DCA 2001). Criminal contempt proceedings are subject to Fla. R. Crim. P. 3.830 and 3.840 and to the "constitutional limitations applicable to criminal cases including the due process requirement of a burden of proof 'beyond a reasonable doubt.'" Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991).

If the state brings a criminal contempt charge against someone alleged to have violated the terms of an injunction, the judge who originally presided over the injunction hearing should consider recusing himself or herself from the criminal proceeding if there could be the appearance of bias.

Civil Contempt

Civil contempt is a remedy of a court "to coerce obedience to its orders which direct a civil litigant to do or abstain from doing an act or acts. . . ." Dowis v. State, 578 So. 2d 860, 862 (Fla. 5th DCA 1991). The preponderance of the evidence burden of proof applies to civil contempt proceedings. Kramer v. State, 800 So. 2d 319, 320 (Fla. 2d DCA 2001).